87-1594

No.

In the Supreme Court of the United States

October Term, 1987

CHARLOTTE CROMAN,

Petitioner,

v.

MANHATTAN COMMUNITY COLLEGE,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
SECOND CIRCUIT

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By Joseph T. Schmidt
Counsel of Record

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Dr. Charlotte Croman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 29, 1988.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the decision of the District Court was not clearly erroneous?
2. Did the District Court rely on the wrong legal standard?
3. Did the District Court's finding that a black male was hired as a role model for students violate female petitioner's rights under the equal protection clause?
4. Did the District Court violate Petitioner's rights under the due

process clause by making a finding of fact that was not in the pleadings, not tried, nor exists in the record?

5. Did the District Court err in permitting defendant's burden to be a mere averment of a legitimate nondiscriminatory reason?

6. Does Title VII permit the victim of a policy of gender discrimination in general to be told that she has not been wronged because an offer was made to one other member of her same sex?

7. Did the District Court violate the concept of fundamental fairness incorporated under the due process clause by permitting defendant at trial to offer a reason for rejecting Petitioner (lack of remediation expertise) which had never been communicated to Petitioner and which conflicts with the reason given to

her at the time of rejection?

8. Did the District Court err in not finding that defendant employer violated Petitioner's rights under the equal protection clause by preferring race over gender in employment?

PARTIES TO THE PROCEEDING

The parties to this proceeding in both the United States District Court and the United States Court of Appeals for the Second Circuit, were Charlotte Croman, plaintiff, and Manhattan Community College, a member unit of the City University of New York, defendant. The Plaintiff is the Petitioner herein.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit will not be reported [App. A-1].[1] The written Opinion of the United States District Court for the Southern District, New York, The Honorable Constance Baker Motley, United States District Judge, Presiding [App. A-5] is reported in 667 F. Supp. 130 (1987).

JURISDICTION

The Opinion of the United States Court of Appeals for the Second Circuit was entered on January 29, 1988. Judgment of the United States District Court for the Southern District of New York was entered on August 7, 1987. The Petitioner invokes the jurisdiction of this

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1. Appendix A shall be referred to as App. A herein.
Tr. shall refer to the original trial record.

Court under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV, Section 1:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII [42 U.S.C. Section 2000 e-2 (a)]:

> It shall be an unlawful employment practice for employer, (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

STATEMENT OF THE CASE

A settlement of a class action suit against the City University of New York by faculty women after a judicial finding of gender discrimination, was reached on May 15, 1984, and a Consent Decree settling the action was approved on July 20, 1984. Dr. Charlotte Croman, Petitioner, was by agreement permitted to waive her award under the Consent Decree and allowed to pursue her individual claim of discrimination. Dr. Croman initially filed a claim of sex discrimination in 1973, with the EEOC, which deferred to the New York State Division of Human Rights, which returned a Probable Cause ruling.[2] At public hearing, the NYSDHR found that defendant Manhattan Community College had not discriminated against Croman because of her sex or race (white). Thereafter on July 16, 1984, the EEOC issued a

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2. Amended on Dec. 3, 1973 to include discrimination because of race.

Determination of Reasonable Cause that the charge was true. Subsequently, it issued a Right to Sue letter to Dr. Croman. On August 2, 1984, Dr. Croman commenced action in U.S. District Court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000 (e) et seq. alleging discrimination based on race and sex. Croman's complaint was that she was not appointed to the Associate Dean of Faculty for Instruction in September 1973, because of her gender (female), and race (white). A black male was hired to fill the position on September 1, 1973.

Dr. Croman, a full Professor at Manhattan Community College, applied for the position of Associate Dean of Faculty for Instruction on October 27, 1972. Dean Myron Pollack sent her a letter stating that she was not qualified because she lacked experience in

statistical analysis and applied research. The statistical analysis prerequisite was not listed in the published job standard. On the same day that Croman applied, a letter was sent to Dr. Frances Minor, a white woman, offering her the job. Minor had been a former colleague of Dean Pollack's and he had personally solicited her. Dr. Minor rejected the offer because the salary was not suitable. In May 1973, Dean Pollack organized a search committee and gave them applications. He did not submit Croman's. She did not know the position continued to be open at that time. The May 1973, search committee interviewed Dr. Minor and recommended her. Dr. Minor rejected the position again, because she was not offered tenure. On August 7, 1973, Dean Pollack organized another search committee. He did not submit Croman's application. The committee

recommended Dr. Keizer, a black male, for the position. Croman did not know that the position had continued to be open. Croman charged that there was nothing posted on the college bulletin board, nor in The New York Times that would indicate that the position was readvertised. The letter from Dean Pollack which rejected Dr. Croman as not qualified was put into her college personnel file and was not removed until January, 1988, although the president had agreed to remove it in 1974. Dr. Croman's information as of September 1973, when Dr. Mervyn Keizer, the black male, was appointed to the position was that only his application and no other had been submitted to the search committee. The covert circumstances surrounding Dr. Keizer's appointment in addition to Croman's previous experience at the college, which had resulted in a formal censure against Croman

for submitting a complaint that the college discriminated against women in promotions, led Croman to believe she had been discriminated against because of her sex and race. A study ordered by the Chancellor of City University of New York, published in December of 1972, found that the University had discriminated against women and the University, in March, 1972 published an affirmative action policy which established an equal employment opportunity program for both women and minorities. Dr. Croman believed the procedures surrounding the appointment of Keizer violated that plan. Dr. Croman had also been told by Dean Eric James, Dean of the College, that the president, Edgar Draper, did not want her in the position because of her gender.

An order denying summary judgment was issued on February 24, 1986 [App. A-21].

A bench trial was held before Constance Baker Motley on April 29, 30 and May 4, 5, 12, and 18 of 1987. During trial, Croman withdrew her claim of discrimination because of race (white) because a ruling which disqualified one of her witnesses resulted in a lack of proof.

The District Court relied on the elements explained in McDonnell Douglas v. Green, 411, U.S. 792, as the standard by which to satisfy a prima facie case [Tr. 452-453; App. A-67, 68]. Dr. Croman had introduced direct evidence of discrimination through the testimony of Dean James, former Dean of the College; Duncan Pardue, a former official of the University; and former Professor Margaret Moreland of Manhattan Community College. Croman also introduced the judicial finding that the University discriminated against women in the manner of salaries

at that time in Melani et al v. Board of Higher Education of the City University of New York, 561 F. Supp. 769 (2nd Cir. 1985). It is the reliance on the McDonnell Douglas standard which Croman challenges in this petition. Croman challenges the standards as inappropriate when direct evidence of discrimination has been proffered.

The District Court ruled that Dr. Croman met her initial burden of presenting a prima facie case of sex discrimination by showing that her "doctorate, years of experience at BMCC, and other qualifications were sufficient to warrant serious consideration for an administrative position such as the associate deanship. In addition, the testimony of Dean Eric James and the statistical evidence plaintiff presented regarding discrimination against women at the college in general supported an

inference of gender discrimination "[App. A-13].

The burden was then shifted to defendant. The District Court relied on the standard for defendant's burden as set out by Texas Department of Community Affairs v. Burdine, 450, U.S, 255 (1981). Defendant's burden of production was met through Dean Pollack's averments and the production of Dr. Frances Minor. Dean Pollack testified that since he had rejected Dr. Croman because of lack of experience in statistical analysis, the college had hired a statistician and that what the college needed was an associate dean with expertise in remediation . He did not proffer any evidentiary support. He stated that Dr. Croman, in his judgment, was not qualified. Dr. Pollack testified that both Dr. Minor and Dr. Keizer were qualified. He proffered no evidentiary support for Keizer's

background in remediation. Dr. Minor testified that she was offered the job on two occasions, refused the offers because they were on terms not suitable for her and that she believed the offers to be bona fide, a fact material to the consideration of the questions presented because the court required the necessity of Croman's having to prove it a sham.

Dean Pollack testified that the position had been readvertised with remediation listed as a qualification, but was unable to produce it. He testified that he was unable to recall more than one application being submitted to the second search committee other than that of Dr. Keizer. Nowhere in his testimony did he state that he recruited Keizer because he was black or that the school was looking for a black male as a role model, a fact material to the conderation of preference for race over gen-

der. He stated that 36 applications were submitted to the first search committee, but could produce none other than Frances Minor's. He stated that eight to ten candidates, including women, were interviewed. The one member of that search committee, Dr. Gustave Manasse, was aware of no other interviews then than of Frances Minor.

The District Court permitted a mere averment by Dean Pollack to suffice. This is material to the consideration of the challenge to the constitutionality of the use of the Burdine standard where the defendant's reason is a subjective determination of the plaintiff's qualifications.

The District Court granted defendant's motion to dismiss at the end of the case [App. A-64].

The United States Court of Appeals affirmed the District Court's decision in

its entirety, without specifically responding to plaintiff's points, finding that the lower court's decision was not clearly erroneous [App. A-3].

JURISDICTION BELOW

The action in the court of first instance was brought pursuant to Title VII of the Civil Rights Act of 1964 as amended, for employment discrimination. Jurisdiction was conferred on the U.S. District Court for the Southern District, New York by 42 U.S.C. Section 2000 e-5. Equitable and other relief were sought under U.S.C. Section 2000 e-5(g). Jurisdiction was also based on 42 U.S.C. Sections 1981 et seq. and 28 U.S.C. Sections 1331, 1343.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT RELIED ON THE WRONG LEGAL STANDARD

The District Court erred by applying

the wrong legal standard. The District Court relied on the McDonnell Douglas v. Green elements to prove discrimination [Tr. 452-453; App. A-68].

The District Court, also erroneously relied on Texas Department of Community Affairs v. Burdine, supra, as the standard for defendant's burden, directing that "the burden now shifts to the defendant to articulate some nondiscriminatory reason for not hiring the plaintiff and, of course, if they do that, then the burden shifts back to the plaintiff to show that the real reason was because she was a woman." [Tr. 454; App. A-70].

The District Court deferred to Dr. Pollack's articulation without demanding any evidentiary support, even though Dr. Croman had introduced direct evidence of discrimination.

Other circuits have found that when

direct evidence of employment discrimination has been introduced, the lower court must specifically state whether or not it believes the plaintiff's proffered evidence of discrimination and that where a case of discrimination is proved by direct evidence, it is incorrect for the court to rely on the McDonnell Douglas v. Green test, because that is only used to create an inference of discrimination from circumstantial evidence. No inference is needed where there is direct evidence. If there is direct evidence such as discriminatory statements, and the court believes it, the defendant should bear the full burden and cannot properly rebut with subjective averments.

The District Court made no finding in its Opinion as to the direct evidence of discrimination which Croman proferred. Dean James, formerly Dean of the College,

testified that the president of the college, Edgar Draper "mentioned to me very frankly that he did not see any sense in hiring women for the job of administration at the college...He didn't want to have women administrators at the college as long as he was president" [Tr. 273]. On cross examination, he stated that the president had told him that he did not want to hire Dr. Croman for the position because she was a woman:

> Q. Dr. James, did President Draper tell you specifically and mention by name that the did not want to hire Professor Charlotte Croman for the position because she was a woman?
>
> A. He did.
>
> Q. He told you in words, that "I do not want to hire Professor Croman because she is a woman"? He specifically said Professor Croman is that your testimony?
>
> A. Yes, that is right. [Tr. 288].

Mr. Duncan Pardue, former special assistant to the Board of Higher

Education testified that Dr. Pollack talked about women on the faculty at Manhattan Community College as being "troublemakers...There were sexual references that they were not to be trusted or something...I have heard him refer to women as cunts and bitches" [Tr. 295].

Professor Margaret Moreland testified that President Draper told her specifically that "affirmative action only applies to black people not women" [Tr. 310].

The college at the time of Croman's application was under a mandate from the City University of New York to implement an Equal Employment Opportunity Plan for women and minorities, a plan which specifically stated that there were to be no preferential quotas established, but that obstacles to hiring and promotion that would allow discriminatory bias be

removed [App. A-53]. This was introduced into evidence.

The District Court's failure to make a finding as to the direct evidence of discriminatory intent and the reliance on the McDonnell Douglas elements to establish an inference is clearly error, and the Court of Appeals for the Second Circuit should have reversed. In Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985) a woman charged discrimination because of her sex when her employer refused to grant her part-time employment on the same basis as male employees and for discharging her for maintaining full-time employment outside while allowing males to do so. The lower court in Thompkins applied the McDonnell Douglas v. Green legal standard as explained by the U.S. Supreme Court in Burdine. She had established disparate treatment and she offered testimony that

the president of her college said he saw no reason for a woman to have a second job. This statement was not rebutted through cross examination or subsequent testimony. The Eleventh Circuit reversed the lower court's decision stating that the lower court must specifically state whether or not it believed the plaintiff's proffered direct evidence of discrimination and that the court had applied the wrong legal standard by applying the McDonnell Douglas test without reference to the proffered direct evidence and that if the court had found plaintiff's testimony credible, the court's ultimate finding that the plaintiff did not meet her ultimate burden was clearly erroneous. In that event, if the court finds that the discriminatory statements were made, it must enter judgment for the plaintiff.

In Lee v. Russell Board of Education,

684 F.2d 769 (11th Cir. 1982), the Court of Appeals reversed the lower court's decision as clearly erroneous, because of the reliance on the McDonnell Douglas elements to prove a prima facie case. The Court of Appeals found that where a case of discrimination is made out by direct evidence, reliance on the McDonnell Douglas/Burdine analysis is unnecessary. It found that direct evidence is of the type that is not properly rebutted by a mere statement of legitimate reason. The court also held that if the lower court disbelieved plaintiff's evidence, it must give some reason for rejecting it.

In Bell v. Birmingham Linen Service Co., 715 F.2d 1552 (11th Cir. 1983), the lower court applied the Burdine test. The Court of Appeals held that once the woman plaintiff introduced direct evidence of discrimination, the employer

could not rebut by merely articulating, and not proving, a legitimate nondiscriminatory reason for its action. In Bell, defendant articulated that the male who was ultimately promoted was more qualified. The District Court found that the plaintiff did not show that the proffered reason was mere pretext. The Court of Appeals vacated and remanded holding that the defendant bears the full burden of the evidence.

Case after case can be cited where in employment discrimination cases, the courts have found that an employer's subjective evaluation, without more, insufficient to sustain their burden of production whether direct evidence of discrimination was proffered or not:

> Subjective and vague criteria may be insufficient reasons given by an employer...because such criteria do not allow a reasonable opportunity for rebuttal Miles v. MNC, 750 F.2d 867 (11th Cir. 1985) at 871.

Establishing qualifications is an

> employer's prerogative...but an employer may not utilize wholly subjective standards by which to judge its employees' qualifications when its promotion process, for example, is charged as discriminatory. Lee v. Conecuh County Board of Education., 634 F.2d 959 (5th Cir. 1981) at 963.

The principle that a defendant relying on a purely subjective reason will face a heavier burden of production than it otherwise would was followed in Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064, 1067 (5th Cir. Unit B, 1981. Vacated on other grounds, 456 U.S. 969, 102 S.Ct. 2229, 72 L. Ed. 2d 842 (1982). Even the Second Circuit has demanded a heavier burden than a mere articulation. Martin v. Citibank, N.A. 762 F. 2d 212 (2nd Cir.,1985).

Neither when ruling that a prima facie case was made nor in its final written decision did the District Court make a specific finding as to the proffered direct evidence of

discrimination.

The District Court found by omission that Croman was not qualified in remediation [App. A-14]. Croman had proffered evidence of a background in remediation and the District Court should have made a specific finding. The District Court found on the basis of unsubstantiated averments by Dean Pollack that Mervyn Keizer was qualified in remediation and had "established a successful remedial program" (App. A-14).

The District Court finding that there were "36 applications" screened by Pollack was on the basis of his averment [App. A-12]. The District Court's finding that other candidates besides Dr. Minor ("eight to ten candidates" App. A-12) were interviewed was on the basis of an unsubstantiated averment by Pollack. The finding that a person experienced in remediation was needed at

all was on the basis of Pollack's unsubstantiated averments.

The District Court's reliance on the McDonnell Douglas elements of a prima facie case is clearly erroneous. Absent finding that Croman's proffered evidence of direct discrimination was not true, Croman should be deemed as having satisfied her ultimate burden. The full burden of proof should have shifted to the defendant and he should not have been permitted to rebut with averments without evidentiary support.

The district and appellate courts are hopelessly confused as to what the proper legal standard is in individual cases of employment discrimination for both plaintiff and defendant. Lower courts differ from higher courts in the same circuit and one circuit differs from another resulting in a mess when in order to obtain justice, a plaintiff is at the

mercy not of blind justice, but a roll of the dice. The U.S. Supreme Court should grant certiorari so that individual claims of employment discrimination under Title VII are no longer subject to arbitrary and capricious choices of legal standards.

II

IT WAS ERROR FOR THE DISTRICT COURT TO AFFIRM A ROLE MODEL JUSTIFICATION FOR THE HIRING OF A BLACK MALE ADMINISTRATOR.

The selection of a black male administrator, Dr. Mervyn Keizer, to fill the position for which Dr. Croman applied, establishes discrimination against Dr. Croman because of her gender. Dr. Keizer's race was the primary factor in his employment. Although the District Court's written opinion found that Defendant Manhattan Community College hired Dr. Keizer "in part because he is black, and the student

body at the time was becoming primarily black" [App. A-14], the District Court's oral opinion at the end of the case finds that the distinguishing factor between Dr. Croman and Dr. Keizer was, in toto, his race:

> THE COURT: I just told you that in my view Dr. Kaiser was at least equally qualified with your client, if not better qualified. But let's leave it at that. He was completely qualified and he was hired not because they were discriminating against women at that juncture, but because they wanted to find qualified blacks. It is as simple as that. [Tr. 738-739; App. A-61, 62].

The District Court justified the purpose of recruiting a black on the basis that he was necessary to serve as a role model to stimulate black and Puerto Rican students:

> ...that is why they selected him (Keizer) because they were in the midst of this open enrollment program, which as we all know brought in blacks and Puerto Ricans into this university system. And what he (Dean Pollack) said in effect is that they decided to put a black male with his qualifications there for the purpose

> of trying to stimulate these blacks and Puerto Ricans. Now, I don't know what is wrong with his having decided to put a black male at that time in that position [Tr. 715].

The U.S. Supreme Court in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), Reh. den'd, 106 S. Ct. 3320 (1986) rejected the theory of retaining minority teachers as role models to counter effects of societal discrimination:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. The role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices...Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged by nonminority employees. 106 S.Ct. at 1848.

In this instant case, the role model defense is being challenged not by a nonminority employee, but by another protected category under the University's affirmative action plan, a woman. The

U.S. Supreme Court has not addressed the question of whether blacks have preference over women, absent any showing that female blacks were recruited, under a voluntary affirmative action plan which does not establish a quota system. What the legal standard is when one minority is preferred over another is not clear.

At trial, no reason was given for preferring Keizer because he was black or wanting a black male. There is nothing in the record. It was a gratuitous conclusion by the District Court. This raises the issue of whether this inference was a proper exercise of the Court's fact finding function. If it is a proper exercise of the Court's function it puts an impermissible burden on Dr. Croman. Under the University's equal employment opportunity mandate, Croman argued that "you can't discriminate against women and take someone because of

their race" [Tr. 717]. The District Court replied that "if you argue that, you discriminate against white women if that is what you are doing. You can argue that" [Tr. 717]. Petitioner Croman argues that the college specifically preferred race to gender in violation of its Equal Employment Opportunity Plan. It is for the U.S. Supreme Court to settle the role model question herein presented as well as the question of when race has precedence over gender. The Court has not addressed the issue of race over gender.

DOES TITLE VII REQUIRE THE VICTIM OF A DISCRIMINATORY POLICY TO PROVE THAT A JOB OFFER TO ANOTHER CANDIDATE OF THE SAME SEX IS A SHAM?

The issue of whether a job offer to one woman proves that defendant did not discriminate against Dr. Croman needs to be addressed. The District Court found

that "defendant showed that it avidly recruited and offered the position in good faith on two occasions to a qualified woman, Dr. Frances Minor, who declined the offer" [App. A-19]. In the District Court's order denying summary judgment, the District Court set down plaintiff's burden regarding Dr. Minor:

> Dr. Minor may have been offered the position because defendant might have been trying to rebut other allegations that it discriminated against women by offering the position to her [App. A-48].

Petitioner argues that having to prove that the offer to Frances Minor was a sham is an onerous burden, because it precludes shifting the burden to the employer to give a legitimate nondiscriminatory reason as to why Dr. Croman's application was not submitted to the search committees. Petitioner argues that the production of direct evidence of discrimination plus the supportable

inference of discrimination in general plus the judicial findings of gender discrimination in Melani et al. v. The City University of New York plus the University's own report that it had discriminated against women, should not be negated because there was a showing that the employer offered the job to another woman. In Connecticut v. Teale, 457 U.S. 440, 73 L. Ed. 2d 130, 102 St. Ct. 2525 (1982), the Court held "that Title VII does not permit the victim of a facially discriminatory ruling to be told that he has not been wronged because other persons of his or her race were hired". 73 L. Ed. 2d at 142. The Petitioner was required, in the instant case, to prove that the offer to Minor was a sham. Croman argues that it is an onerous burden which Congress never meant to impose. There was no facially discriminatory policy at work here, as in

Teale. However, there was a finding of a discriminatory policy in general. This Court must address the issue of whether the obstacle Croman has been required to hurdle is onerous and repugnant to Title VII.

CONCLUSION

The decision of the District Court represents a grave departure from other circuits and from the equal protection and due process precedents of this Court. The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Joseph T. Schmidt,
Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of January, one thousand nine hundred and eighty-eight.

Present:

HONORABLE WILFRED FEINBERG,

Chief Judge

HONORABLE THOMAS J. MESKILL,

HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

----------X

CHARLOTTE CROMAN,

Plaintiff-Appellant,

-against-

BOROUGH OF MANHATTAN COMMUNITY COLLEGE,

Defendant-Appellee

----------X

Appeal from United States District Court for the Southern District of New York.

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Judge Motley dismissed appellant's complaint of sex discrimination against appellee on the ground that appellant, after a bench trial, failed to prove by a fair preponderance of the credible evidence that appellant was denied a promotion to the position of associate dean of the faculty because of her gender. The judge found that appellant failed to meet her "ultimate burden" of showing that the reasons articulated by appellee for denying the position to appellant were a pretext for unlawful discrimination. The district court's determination is not clearly erroneous and we see no reason to disturb it.

2. We have considered all of appellant's contentions and find them to be without merit.

WILFRED FEINBERG, Chief Judge

THOMAS J. MESKILL,

J. DANIEL MAHONEY,

Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT 84 Civ.

SOUTHERN DISTRICT OF NEW YORK 5492(CBM)

CHARLOTTE CROMAN,

Plaintiff

-against-

MANHATTAN COMMUNITY COLLEGE,

Defendant.

APPEARANCES:

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MOTLEY, J.

Findings of Fact and Conclusions of Law

Plaintiff commenced this action on August 2, 1984 pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq. The complaint alleged that plaintiff Charlotte Croman was not appointed to be Associate Dean of Faculty at defendant Borough of Manhattan Community College because of her sex (female) and her race (white). Plaintiff dropped her claim of racial discrimination at trial. (Transcript at 194.) A bench trial before this court commenced on April 29 and ended on May 18, 1987. For the reasons stated below, the court finds that plaintiff has not met her burden of proving by a clear preponderance of the credible evidence that she was denied the appointment she sought because of her gender.

Findings of Fact

Plaintiff Charlotte Croman, a white woman, is a member of the faculty at defendant Borough of Manhattan Community College ("BMCC"), a position she has held since 1964. Plaintiff has a B.S. degree from New York University, a Master's Degree in Education from Southern Connecticut State College, a Master's Degree in Psychology from Hunter College, and a Ph.D. in Theater Arts from New York University. Plaintiff was hired by BMCC as an instructor in 1964 and was promoted to the position of Assistant Professor in 1966. In 1967, she received tenure. She was then promoted to Associate Professor in 1968 and to Full Professor in 1972.

Myron Pollack served as Dean of Faculty at BMCC from September, 1972, through August, 1974. When Pollack was hired in 1972, the academic program of BMCC was, as a result of the "open

Admissions" policy of the New York City Board of Higher Education, in a state of transition. One of the ways in which this transitional period manifested itself was the change of the BMCC student body from predominantly white to predominantly black.

As Dean of Faculty, one of Dean Pollack's primary duties was the development of a remedial program, which was made necessary, in part, by the open admissions policy. The Board of Higher Education and the Chancellor of the City University of New York had directed BMCC to establish such a program. In developing the required remedial program, Dean Pollack sought to hire an Associate Dean of Faculty for Instruction. That person was to share the overall responsibilities associated with the academic program of the college and to integrate the remedial program into the entire curriculum. The

position was advertised in the New York Times on September 24, 1972. Dean Pollack also sought to hire an Assistant Dean of Faculty who would be responsible for the actual day-to-day operation of the remedial program.

In the fall of 1972, Dean Pollack asked Dr. Frances Minor, a white woman, to apply for the position of Associate Dean of Faculty for Instruction. Dean Pollack had known and worked for several years with Dr. Minor when both were members of the faculty at New York University. Dr. Minor submitted a formal application to Dean Pollack.

Dr. Minor holds a B.S. degree from New York University and a Master's Degree and a Doctor of Education Degree, both from Teacher's College at Columbia University. She began teaching at New York University in 1959, was promoted to associate professor with tenure in 1972,

and became a full professor in 1974. Dr. Minor also participated for two years in a program at Yale University in which she helped community college students with reading and writing.

After Dr. Minor submitted her application, she was interviewed by President Draper. By letter dated October 27, 1982, President Draper offered the Associate Dean position to Dr. Minor. Dr. Minor did not accept the offer because the salary was not to her satisfaction and because the position was described as being of a "temporary nature." By letter dated November 2, 1972, President Draper reiterated the offer, offering the same salary and explaining that the "temporary nature" language did not refer to her position. Dr. Minor again declined because she was not satisfied with the salary and because she would be unable to begin work at BMCC

in February, 1973, as required by the letter.

In response to a posting at the College, plaintiff applied to President Draper by letter dated October 27, 1972 for the position of Associate Dean of Faculty for Instruction. After advising plaintiff by letter dated October 31, 1972, that she would be considered for the position, Dean Pollack, in a telephone conversation of November 16, 1972, informed plaintiff that she had been rejected for the position. That rejection was confirmed in writing by letter dated November 22, 1972. In that letter, Dean Pollack stated that plaintiff failed to meet the requirements for the Associate Dean position that were enumerated in an advertisement which appeared in the New York Times on September 24, 1972. Dean Pollack wrote that plaintiff's record showed "a lack of

expertise in the areas of statistical analysis and research design."

After the November 22, 1972 rejection, plaintiff neither asked Dean Pollack to reconsider his decision nor communicated with him regarding the Associate Dean position. Furthermore, plaintiff never reapplied for the Associate Dean position after her rejection in November, 1972.

In the spring of 1973, Dean Pollack formed a faculty search committee composed of several faculty members, the purpose of which was to recommend a person to fill the position of Associate Dean of Faculty for Instruction. Of the 36 applications screened by Dean Pollack, the committee interviewed eight to ten candidates, including Dr. Frances Minor. On May 17, 1973, the committee voted unanimously to offer Dr. Minor the position. By letter dated June 5, 1973,

President Draper again offered the Associate Dean position to Dr. Minor, this time at a higher salary. Dr. Minor, however, felt that she could not accept the appointment without tenure, and again declined the offer.

After Dr. Minor declined President Draper's offer, a second faculty search committee was formed. This committee was composed of five men and one woman. Plaintiff's application was not brought before this committee, and at that time plaintiff did not know that the position was still open. Dr. Eric James, former Dean of the College testified that he believes that President Draper did not want Dr. Croman to have the position because she was a woman. There is statistical evidence that discrimination against women faculty members in promotions and salary increases existed generally at BMCC at that time.

On July 31, 1973, the committee interviewed Dr. Mervyn Keizer, a black male, and voted unanimously to offer him the position of Associate Dean. Dr. Keizer holds a doctorate from Harvard and has taught at Federal City College in the District of Columbia. At Federal City College, which had a student population similar to that of BMCC, Dr. Keizer established a successful remedial program. Dr. Keizer's appointment at BMCC, which was without tenure, began September, 1973, and ended in June, 1974.

Both Drs. Minor and Keizer were qualified for the position of Associate Dean of Faculty for Instruction. The offers to both applicants were legitimate offers, and were made in good faith. Defendant hired Dr. Keizer in part because he is black, and the student body at the time was becoming primarily black.

On October 2, 1973, plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that defendant discriminated against her because of her sex. In that charge, plaintiff made no claim based on race or color.

Thereafter, on October 26, 1973, plaintiff filed a complaint with the New York State Division of Human Rights ("State Division") in which she also claimed that she was discriminated against because of her sex. On December 3, 1973, plaintiff amended her State Division complaint to add a claim of discrimination on account of her race and color. The EEOC deferred to the State Division for investigation of plaintiff's charges and the State Division subsequently issued a probable cause determination.

At State Division hearings conducted on October 16, 17, and 18, 1978, and January 3, March 28, and May 4, 1979, plaintiff's claims were adjudicated before Administrative Law Judge Matthew Foner. In his decision dated July 16, 1979, Judge Foner found that defendant had not discriminated against plaintiff on the basis of sex, color, or race. Judge Foner's decision was affirmed on August 8, 1980 by the New York State Human Rights Appeals Board.

On July 16, 1984, the EEOC issued a "Right to Sue" letter to plaintiff, and on August 14, 1984, plaintiff commenced this action.

Conclusions of Law

In Title VII sex discrimination case, the basic allocation of burdens and order of presentation of proof are as follows.

> First, plaintiff has the burden of proving by a preponderance of the evidence of prima facie case of discrimination. Second, if the plaintiff succeeds in doing so, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employee's rejection. Third, once defendant articulates a legitimate, non-discriminatory reason, plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by defendant were not its true reasons, but were merely a pretext for discrimination.

Texas Department of Community Affairs v. Burdine, U.S. 248, 252-53, 101 S. Ct. 1089, 67 L.Ed.2d 207, 215 (1981).

As the court ruled at trial, plaintiff met her initial burden of presenting a prima facie case of sex discrimination by showing that she applied for an available position for which she was qualified, but was rejected under circumstances that give rise to an inference of unlawful discrimination. See Id. She did this by showing that she was rejected for a position that she was at

least minimally qualified for, in the sense that her doctorate, years of experience at BMCC, and other qualifications were sufficient to warrant serious consideration for an administrative position such as the Associate Deanship. In addition, the testimony of Dean Eric James and the statistical evidence plaintiff presented regarding discrimination against women at the College in general supported an inference of gender discrimination.

The court also finds that defendant met its burden of articulating some legitimate, nondiscriminatory reason for Croman's rejection through the testimony of Dean Pollack that Croman was rejected because she was not qualified for the Associate Deanship.

However, plaintiff has failed to meet her ultimate burden of proving that defendant's articulated, legitimate,

nondiscriminatory reason for her rejection was pretext for unlawful discrimination based on sex, or that she was not appointed as Associate Dean because she is a woman. Defendant showed that it avidly recruited and offered the position in good faith on two occasions to a qualified woman, Dr. Francis Minor, who declined the offer.

Defendant then offered the position to Dr. Keizer, a qualified black male, who accepted the position. Defendant did not discriminate against plaintiff because she is a woman by hiring Dr.Keizer.

CONCLUSION

Plaintiff's complaint is dismissed because she has failed to prove by a fair preponderance of the credible evidence that she was denied the position of Associate Dean because of her gender or that defendant's proffered reason for not promoting her was a pretext for discrimination.

Dated: New York, New York
August 7, 1987

CONSTANT BAKER MOTLEY
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 5482 (CBM)

CHARLOTTE CROMAN,
Plaintiff
-against-
MANHATTAN COMMUNITY COLLEGE,
Defendant.

APPEARANCES:

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MOTLEY, Ch. J.

OPINION

Plaintiff, Charlotte Croman, a member of the faculty of defendant Manhattan Community College of the City University of New York ["MCC"], has commenced this sex and race discrimination action against defendant pursuant to Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. section 2000e, et seq. The complaint alleges that defendant did not appoint plaintiff to the position of Associate Dean of Faculty for Instruction because she is a white female.

Defendant has moved for summary judgment on three grounds: (1) the Court lacks subject matter jurisdiction over plaintiff's claim of race discrimination because plaintiff's charge of discrimination filed with the Equal Employment Opportunity Commission ["EEOC"] contained a complaint of sex discrimination only;

(2) plaintiff's claims are barred by the statute of limitation; and (3) plaintiff has failed to establish a a prima facie case of discrimination on the basis of sex and race. Plaintiff has cross-moved for summary judgment, contending that the undisputed facts require a finding that defendant discriminated against her because of her race, sex and color.

Both motions are denied.

FACTS

Plaintiff was hired by defendant as an instructor in the English Department as of September 1, 1964. In 1966, she was promoted to the position of Assistant Professor, and in 1968, to Associate Professor. In January, 1972, she was promoted to the position of Professor.

In January of 1970, plaintiff and another female colleague, Associate Professor Leigh Marlowe, had filed a grievance through the faculty union alleging that defendant discriminated against women in promotions and appointments to administrative posts. "Ethnicity" was cited as another improper factor considered in administrative appointments. The two women were censured by the College-wide Personnel and Budget Committee for "embarrassing the President, Dean, College-wide Personnel and Budget Committee," and for conduct "unbecoming" of faculty. The two women filed another grievance charging the college with contractual violations and lack of academic due process in the manner in which they were censured. The A grievance was sustained by the Dean of Administration.

In June, 1971, the Dean of defendant college, Dr. Eric James, suggested plaintiff should apply for the position of Head of the Liberal Arts Division. During a conference with the President of the College, Dr. Edgar Draper, plaintiff was advised that she lacked the administrative experience required for the position. Plaintiff contends, however, that she had such experience. For instance, she was the Chair of the Department of English. Subsequently, the job title of Head of the Liberal Arts Division was eliminated.

On October 27, 1972, plaintiff applied for the position of Associate Dean of Faculty for Instruction. A notice for the position had been posted on the faculty bulletin board and included a detailed job description as to the duties of the Associate Dean. The notice was dated April, 1972.

(Defendant's Exhibit "4".) In applying for the position, plaintiff wrote Dr. Draper that she was applying for the position of "associate dean of instruction."

On the same day, October 27, the position for Associate Dean of Faculty for Instruction was offered to Dr. Frances Minor, a tenured associate professor at New York University. (Defendant's Exhibit "8".) Dr. Minor had applied for the position at the request of Dr. Myron Pollack, Dean of Faculty. Dr. Minor, a white female, did not accept the October 27th offer because she was not satisfied with the proposed salary and the position was of a "temporary nature." See Transcript of Dr. Minor's testimony at hearing in State Division of Human Rights on October 17, 1978, pp. 146-47.

On October 31, 1972, Dr. Pollack advised plaintiff by letter that her application would be given consideration. Attached to his letter, however, was a job description entitled "Associate Dean of Faculty for Instructional Media." Plaintiff, on October 31, told defendant she was seeking a different position, that of Associate Dean of Faculty for Instruction, and was advised that the position had been offered to another person.

On November 2, 1972, Dr. Minor was offered the Associate Dean position again. Once more she declined the offer because she found the salary unsatisfactory.

Plaintiff was advised by Dean Pollack during a telephone conversation that she would not be considered for the position of "Associate Dean of Faculty." By letter dated November 22, 1972 Dean

Pollack advised plaintiff that the reason for this decision was that plaintiff lacked "expertise in the areas of statistical analysis and research design." (Defendant's Exhibit "10".) Attached to his letter was a job description for the position of "Associate Dean of Faculty for Research, Curriculum, and Academic Advisement," again a position different from that which plaintiff was seeking. This letter was placed in plaintiff's personnel file. Plaintiff contends that she did not receive this letter until December 1, 1972.

In the spring of 1973 a search committee was established to find a person for Associate Dean of Faculty for Instruction. Defendant contends that the position was advertised in the New York Times and "made known throughout the college." Defendant's Exhibits "11" (transcript of testimony of Wilhemina

Glanville, member of search committee, before the State Division of Human Rights, p. 695) and "12" (Report of the Search Committee, dated May 30, 1973). Plaintiff asserts, however, that no advertisement was ever placed in the New York Times since defendant never produced a copy of it and she could not locate a copy of it in the Times archive. According to defendant, thirty-six persons submitted applications in response to the New York Times advertisement or after hearing about the position by word of mouth. The committee interviewed Dr. Frances Minor, who again applied at the urging of Dean Pollack, and she was offered the position for a third time on June 5, 1973. (Defendant's Exhibit "13".) She declined the position because it was without tenure. (Minor transcript, pp. 163-66.)

A second search committee was then formed an on July 31, 1973 Dr. Mervyn Keizer, a black male, was interviewed and the committee voted unanimously to offer him the position. Defendant's Exhibit "14" (Report of Search Committee, dated August 7, 1973). Dr. Keizer accepted the offer which was without tenure. He was dismissed in June, 1974. Plaintiff asserts that Dr. Keizer was not asqualified for the position as she was and that he also did not have experience with statistical analysis and research design.

Defendant contends that plaintiff never reapplied for the position after she was advised by Dean Pollack that she was rejected for the position. During her deposition taken in connection with the matter, plaintiff also admitted she never advised anyone she wished to be reconsidered for the position. She,

however, asserts that her application should have been considered after Dr. Minor turned down the position since plaintiff had requested that defendant remove from her file the November 22, 1972 letter of Dean Pollack, indicating she was not qualified for the position of Associate Dean of Faculty. After she filed a grievance concerning the dispute, and after arbitration, defendant agreed to remove the letter from plaintiff's file in April, 1974. The letter was not removed, however, until January 22, 1985, nearly eleven years from the date defendant agreed to remove it. Plaintiff asserts that based upon these actions defendant should have known her application was still in effect in 1973.

Plaintiff also asserts that she never was informed that the search committee had been established in 1973 and were

accepting applications. She asserts that no advertisements were placed in the New York Times and no notices were posted in the college. In addition, the two search committees had not been advised that she previously had submitted an application for the Associate Dean position.

On September 29, 1973, plaintiff a complaint with the EEOC, alleging discrimination on the basis of sex. On October 25 she filed a complaint with the New York State Division of Human Rights, which she amended on December 3, 1973 to include race and color. The EEOC deferred to the State Division of Human Rights for investigation of plaintiff's charge. The State Division issued a probably cause determination and a full evidentiary hearing was held. Subsequently, the State Division found defendant did not discriminate against plaintiff on the basis of race, color or

sex. (Defendant's Exhibit "1"). This determination was affirmed by the Human Rights Appeal Board. (Defendant's Exhibit "2").

The EEOC then investigated plaintiff's complaint and determined that there was reasonable cause to believe that plaintiff's charge was true and on July 16, 1984 the EEOC issued a right to sue letter to plaintiff.

On or about August 14, 1984, defendant was served a summons and complaint in this action, alleging that the defendant discriminated against her by failing to appoint her to the Associate Dean position. She later amended her complaint to include charges of continuing discrimination but has not set forth any facts in her complaint in support of this allegation.

DISCUSSION

EEOC FILING

Defendant asserts that plaintiff may not sue for alleged racial discrimination since she did not assert such a claim in the charge she filed with the EEOC. She only asserted sexual discrimination in the EEOC charge, although she subsequently amended her complaint before the State Division of Human Rights to charge discrimination based on sex, race and color. Plaintiff recently has submitted a letter from the EEOC indicating that it had, in fact, considered her claims of sex, race and color discrimination. Accordingly, plaintiff's motion for summary judgment on this ground is denied since documentary evidence establishes that the EEOC has considered plaintiff's charge of race discrimination.

STATUTE OF LIMITATIONS

Defendant has also moved for summary judgment on the ground that plaintiff failed to file her charge with the EEOC within the 180 day statute of limitations period set forth in 42 U.S.C. section 200e-5(e). Plaintiff filed her charge with the EEOC on October 2, 1973.

Defendant contends that the 180 day period began to run on November 16, 1972, the day that plaintiff's application for Associate Dean was rejected. Plaintiff, on the other hand, asserts that the period did not commence to run until September, 1973, the date that Mervyn Keizer was appointed to the position. She also contends that she has asserted a claim on continual discrimination since the November 22, 1972 letter of Dean Pollack finding her unqualified was never removed from her personnel file.

Plaintiff, in asserting that the defendant's actions in failing to appoint her as Associate Dean constitutes continuing discrimination, relies on Verzosa v. Merrill Lynch, 589 F.2d 974 (9th Cir. 1978). In Verzosa, plaintiff applied for promotion from a supervisory clerk position to an account executive four times but was denied promotion each time. Evidence presented at trial indicated he was qualified for the position. In that case, however, the court did not discuss whether the failure to promote was continuing discrimination since the defendant had stipulated to jurisdiction in the pretrial order. Id. at 977. In addition, the court found that there was proof in the record of plaintiff's continuing interest in promotion throughout the statutory period and defendant's refusal to promote him. Id.

In this case, plaintiff's complaint refers to the defendant's failure to appoint her to the position of associate dean. The charge to the EEOC and the complaint before the State Division of Human Rights refers to her rejection for Associate Dean of Faculty for Instruction. In addition, there is no allegation in plaintiff's statement pursuant to Local Rule 3(g) that she applied for any other associate dean positions and was rejected. In fact, plaintiff, during her deposition, admitted she had never advised defendant that she wanted to be reconsidered for the position. Plaintiff complains, only in her affidavit submitted in connection with the summary judgment motion, that she had not been notified of, or invited to apply for any administrative positions which were vacant, except for the position of the Dean of Faculty in the

Spring of 1985. That position, according to plaintiff, has since been withdrawn pending a new president. She asserts defendant has failed to advertise most positions as required by the policy of the Board of Higher Education Plaintiff does not state, however, that no notices were placed on the faculty bulletin board and does not indicate what positions, if any, were available for which she was qualified. Plaintiff states only that she was never informed or invited to apply for such positions. Plaintiff does not indicate or prove that defendant had an affirmative duty to notify her or to invite her to apply for any position which became available. In fact, the record reveals only two people who were invited to apply for any deanship position, plaintiff and Dr. Minor. Both are white females. Plaintiff also makes the unsupported argument that because the

letter of Dean Pollack finding her unqualified for an Associate Dean position remained in her file she was never considered for any deanship subsequently. There is no evidence that plaintiff ever sought to be considered for any other deanship position.

Plaintiff's affidavits and proof submitted in connection with this summary judgment motion does not support her claim of continuing discrimination. "[A] 'discriminatory refusal to hire, ...without more, is a discreet and completely unlawful act...even if a complainant continues to suffer the effects of discriminatory conduct.'" Vulcan Society v. Fire Dep't of City of White Plaints, 82 F.R.D. 379, 394 n.25 (S.D.N.Y. 1979), quoting Carter v. Delta Airlines, Inc., 414 F.Supp. 808 (S.D.N.Y. 1977). Additionally, a conclusory allegation of continuing discrimination

cannot suffice to excuse untimely filing under Title VII. Marlarkey v. Texaco, Inc., 559 F.Supp. 117 (S.D.N.Y. 1982), aff'd, 704, F.2d 675 (2d Cir. 1983).Accordingly, plaintiff has not set forth a claim of continuing discrimination.

Defendant argues that the date plaintiff received notification that she was not promoted should control. It asserts that "the timeliness of a discrimination claim is measured from the date the claimant received notice of the allegedly discriminatory decision, not from the date the decision takes effect." Chardon v. Fernaex, 454 U.S. 6 (1981). Defendant, relying on Delaware State College v. Ricks, 449 U.S. 250 (1980), asserts that once the allegedly discriminatory decision is made and communicated to the employee, the statute begins to run. In Ricks, the Supreme

Court held that the statute of limitations commenced on the date that defendant college advised plaintiff he would not receive tenure. In O'Malley v. GTE Service Corp., 758 F.2d 818 (2d Cir. 1985), also cited by defendant, the statute of limitations in an Age Discrimination action was held to commence on the date plaintiff received notification that he would have to retire. In each of those cases, however, plaintiff was not seeking a position that another individual also was seeking or was given in his stead. Contrary to those cases, plaintiff in this action sought a position which was given to another individual instead.

Plaintiff argues that the statute of limitations did not run until Keizer was selected for the position. She relies on Gates v. Gerogia-Pacific Corporation, 492 F. 2d 292 (2d Cir. 1974) to support her

proposition that it is the date that the position was filled that determines when the statute begins to run. In Gates, plaintiff had been rejected for a position as an accountant. Defendant had never notified plaintiff that she was rejected until she reapplied for the position nine months after her initial interview. Defendant argued that the statute of limitations began to run as of the date of plaintiff's interview. The Court of Appeals rejected this argument and stated that "[t]he alleged unlawful employment practice is not complete until the position is filled and no longer available to the claimant." Id. at 294-95.

The Second Circuit, in Bethel v. Jefferson, 589 F.2d 631, 637 (2d Cir. 1978), indicated that where a claim in a suit encompasses a chain of connected events continuing over a desirable time

span, such as plaintiff alleges in this case, the alleged discrimination could not "become consummated until the particular adverse personnel action attained finality." Id. at 636. At this point, it cannot be determined when the personnel action attained finality. If the position were readvertised as defendant contends and the applicants considered were those who responded to the advertisement or notices posted by the Search Committee, the date of the advertise employment action would be as of November 16, 1972, the date plaintiff was advised that she was not being considered for the position. If the position were not advertised, it seems that the date would be as of the date Dr. Krevitz was appointed. In that case, plaintiff would have filed her complaint with EEOC timely. Accordingly, it appears that summary judgment must be

denied as to this issue without prejudice. A determination as to the date the adverse personnel action attained finality will have to await trial.

Plaintiff also relies on the equitable tolling theory set forth in Cerbone v. International Ladies Garment Workers Union, 768 F. 2d 45 (2d Cir. 1985). The court indicated that the date of notice of discriminatory action should be applied "if the employee can show that it would have been impossible for a reasonably prudent person to learn that [defendant's employment decision] was discriminatory." Plaintiff asserts that until "a black male" was appointed, she could not have known she was being discriminated against. Yet elsewhere in her summary judgment papers she complains of a history of sex and race discrimination at Manhattan Community

College prior to this incident. Plaintiff claims discrimination was pervasive at the college yet claims she had no reason to believe that she was not hired because of her sex and race. By her own assertions, plaintiff raises an issue of fact as to whether an equitable tolling period should be applied. Accordingly, summary judgment should be denied, without prejudice.

Finally, it does not appear that defendant has waived its statute of limitations defense as plaintiff contends. The plaintiff asserts that defendant' answer to plaintiff's Interrogatory Number One constitutes a waiver of that defense. Defendant's carefully worded answer states:

> At this time defendant <u>intends</u> to withdraw its affirmative defense.

Defendant took no affirmative action to act on this intention, never filed any stipulation or amended its answer. Therefore, while defendant might have considered withdrawing the defense, there has never been a waiver or withdrawal of that offense by defendant.

PRIMA FACIE CASE

In order for a plaintiff to establish a prima facie case of sex discrimination, she "must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The plaintiff must show:

> i) that [she] belongs to a [protected] minority; (ii) that [she] applied and was qualified for a job for which the employer was seeking

> applicants; (iii) that, despite [her] qualifications [she] was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Defendant argues that the three offers to Dr. Minor, a white female, of the position of Associate Dean is convincing evidence of lack of discriminatory animus. Plaintiff asserts that these offers were made to Dr. Minor in good faith but has presented no proof to substantiate these allegations. Plaintiff claims that the third offer was for a non-tenured position, while the previous offers were for a tenured position. The fact, according to plaintiff, demonstrates the lack of good faith of defendant. Plaintiff ignores the fact that the offer of employment to Dr. Keizer was also for a non-tenured

position. The evidence produced by plaintiff, without more, only demonstrates that defendant changed its mind about some of the rights and benefits that would come with the Associate Dean position.

The mere fact that Dr. Minor was offered the position, however, may not be enough to defeat plaintiff's claim. Dr. Minor may have been offered the position because defendant might have been trying to rebut other allegations that it discriminated against women by offering the position because she was a woman. The City University has been found to have discriminated against women in the past. Milani v. Board of Higher Education of the City of New York, 73 Civ. 5434 (S.D.N.Y. March 17, 1983) (class action in which defendant was found to have discriminated against women in payment of salaries). Furthermore,

should the evidence establish that the availability of the position was never advertised in the Spring of 1973, it is not an insignificant factor in deciding this motion that the Search Committee was never advised that plaintiff was interested in the Associate Dean position.

Much ado has been made about the advertisement allegedly place in the New York Times when the Search Committee was established. Plaintiff asserts no notice was ever placed in the newspaper since defendant has not produced it and she has not been able to find it. Defendant has not submitted the New York Times advertisement either. It has, however, submitted a memorandum of the Search Committee, dated May 30, 1973. The memorandum provides:

> The Committee received applications from thirty-six people, in response to our advertisement place in The New York Times and by word of mouth.

An issue of fact exists as to whether the newspaper advertisement was placed and whether proper notification concerning the availability of the position was given. If the advertisement were not placed in the New York Times, further evidence would be required to determine what motives, if any, defendant had in not placing the advertisement. In addition, although thirty-six people applied for the position, there is insufficient evidence in the record before the court on this motion to determine if any of the individuals had submitted their applications earlier or in response to the advertisements by the Search Committee.

Moreover, even if defendant produces the New York Times advertisement, an issue of fact exists as to whether

defendant was aware or had any reason to be aware that plaintiff's application for the position was a continuing application for that position during the Spring of 1973. The various letters to plaintiff from the college's administration indicate that there may have been some confusion over what position plaintiff had applied for. If plaintiff had notified them that she was interested in the Associate Dean of Faculty for Instruction, as she contends, there is a possibility that defendant knew plaintiff's application for the position was still in full force and effect when it began its search for a new associate dean in the spring. It is undisputed that plaintiff's application was never submitted to the Search Committee, and defendant's motive, if any, in failing to submit the application to that committee must be determined at trial.

Accordingly, plaintiff's and defendant's motions for summary judgment are be denied

Dated: New York, New York
February 24, 1986

CONSTANCE BAKER MOTLEY
Chief Judge

BOARD OF TRUSTEES POLICY ADOPTED 1972
Affirmative Action

The City University and its component units reaffirm their support for the principle of Equal Employment Opportunity and commit themselves to a Program of Affirmative Action aimed at increasing employment and promotional opportunities for members of minority groups by adopting an Affirmative Action Compliance Program. (Board Minutes 1970, pp. 256-8) (Previous reference, Board Minutes 1963, p. 11).

Women who are potential or active candidates for employment, promotion or tenure at City University must be afforded absolute and unequivocal guarantees against sex discrimination. Those with decision-making authority over hiring, promotion and tenure are to be made acutely conscious of the University's legal and moral responsibilities. (Board Minutes 1971, p. 208 and p. CC 158)

A Human Rights Unit will be established in the Affirmative Action Office, which will be an internal mechanism involved in the ongoing programs of the University or in the hiring problems of the University, to review charges of discrimination on the basis of race, religion, sex, or any of the things that re included in the President's Executive Orders. (Board Minutes 1972, p. 11 and p. CC 10)

The Affirmative Action Report approved on November 22, 1971 reflects the Board's intent to develop a policy statement that would meet the criteria of the federal executive orders but would not be erroneously interpreted to mean that the University was attempting to establish an employment quota system based upon race, religion, gender or ethnic origin.

The affirmative action policy requires the college and the central administration of the University to develop affirmative action plans that would overcome the causes as well as the conditions of de facto discrimination in employment against women and minorities. This does not mean that the plans or their implementation require preferential treatment in recruitment hiring, or promotion on the basis of criteria other than merit. It is the Board's overall policy, of which affirmative action is an important component, that the choice among candidates for hiring or promotion is to be that candidate demonstrating the maximum potential for meeting the job's requirements. Employment selection is to be based primarily upon vocational or professional competence within the framework of those constraints set by civil service law, the Board's bylaws and those professional standards duly established by constituent faculty.

It is the Board's feeling that this policy will enhance rather than impair our ability to eliminate conditions of de facto discrimination where they now exist within CUNY. Implementation of this affirmative action policy will require serious and sustained effort to reach and convince members of all groups which are presently the victims of de facto discrimination employment opportunity. (Board Minutes 1972, pp. 43-4 and pp. CC 30-31)

THE COURT:

I think you have put in enough evidence from which the court could infer as you say that they have a policy of preferring males to women when it came to deanships. That is easy. But the problem is in your client's case: Has she shown that she was passed over pursuant to that policy, or was there some other legitimate nondiscriminatory reason that they have suggested here for her not being appointed? You have to show that also. You can't just show they had a policy of discrimination. I don't think that is enough. You have to show that our client was qualified or better qualified and some male was appointed.

I believe I pointed out to you that I thought this Professor Kaiser was certainly as qualified as your client for that position. She would have to show that somebody less qualified--she hasn't shown that--in my view he was equally

qualified, with his experience at that college in the District of Columbia. She is claiming that they put males in those positions. The male they put in there was equally qualified if not better qualified, and in addition, they obviously took his race into account. I would have to see that and find that they took him, assuming both were equally qualified because he was black. There is no question about it in my mind from the evidence.

MR. SCHMIDT: Dr. Pollack never testified that that was the reason.

THE COURT: I think he did. In my judgment he said that. For some reason, he didn't want to come out and say black people and Puerto Ricans. That is a hang up he has. I have been in New York City for 45 years. I know the Borough of Manhattan Community College is predominantly black and Puerto Rican. So does

everything else who knows anything. Why he is avoiding saying that, I can't imagine, but that is his problem.

They appointed him according to what he said in part because he was black. That is what he said. That is why they put him there. And as it turned out, he had problems with everybody And so he couldn't get along with people. That is another problem, but that doesn't show he was not qualified for the job. He had personality problems I assume.

That is the problem as I see it with this case. Now, they offered it to a woman who is white and I don't know if the record showed that. I don't think there is any question about the fact that this Minor woman was white. She was qualified for the position and turned it down for the perfectly legitimate reason that they couldn't offer her tenure. And when they say they couldn't offer her

tenure, they are giving me a legitimate reason for not giving her tenure.

MR. SCHMIDT: Why did they offer it to her on two occasions when they knew that she would not accept it? Why didn't they offer it to Dr. Kaiser then? If they wanted a black in, why did they offer a job to a woman whom they knew would not take it? She said she was shocked, surprised, when they didn't offer her the tenure. And they knew that she wouldn't accept it. She said she explained that to Pollack in the beginning.

In addition, judge, they never gave my client the consideration. Dr. Pollack didn't. If they are equally qualified, then why did he exclude her? Why did he exclude her application?

THE COURT: My own feeling is from his testimony and he testified for quite a while here, is that he just didn't like

your client. He had some other reason. He thought she was not the proper person for it. Why he didn't say that, I don't know. I just think he thought your client was a troublemaker. For some reason he was avoiding saying that. I don't know why. But that is my impression from listening to him testify, that he just didn't like your client. And he wasn't against women per se. He just didn't like that particular woman, which is different.

MR. SCHMIDT: It is different except the notice came from Dr. Draper who told Dean James that he did not want my client there because she was a woman. There is the testimony to that.

I would ask your Honor to give me an opportunity--going through Dr. Pollack's testimony, there are numerous inconsistencies in his testimony.

THE COURT: Yes, that is true, but I have to look at his testimony as a whole. And that is what I conclude from his testimony. He just didn't like your client. And that is why he didn't push her. He was pushing somebody else that he knew and had worked with and so forth; and after looking at the woman and listening to her, I could see why he would want her. She seemed like a very capable person. He had had experience with her.

MR. SCHMIDT: What we are really talking about, if they had hired her, we wouldn't be here because we can't claim that he gave the position--if the position is given to a woman even if she was less qualified, I could not bring a Title 7 suit because there would be a woman even though she might even be less qualified. That is not the issue. The issue is Dr. Kaiser.

THE COURT: I just told you that in my view Dr. Kaiser was at least equally qualified with your client, if not better qualified. But let's leave it at that. He was completely qualified and he was hired not because they were discriminting against women at that juncture, but because they wanted to find qualified blacks. It is as simple as that.

MR. SCHMIDT: They ignored the affirmative action program at the college. They ignored the finding that showed women were discriminated against at higher posts.

THE COURT: You have evidence from which the court could find that they had a policy of giving preference to males for the higher positions. Their own report said that.

MR. SCHMIDT: You have testimony from the aide to the chancellor saying that he said that women at the faculty there are

a bunch of "cunts and bitches." That is direct testimony I think of discrimination against the college against woman in light of all of this other testimony.

I would ask your Honor to give me an opportunity to go through these exhibits and try to point all of that out.

THE COURT: As I have indicated, I think that the plaintiff has failed to carry her burden of proving that she was denied the position because she is a woman. I think that, as I have said, the evidence is such that the court could infer that they had a policy of preferring males which was probably continuing at that time, but the plaintiff has failed to prove that as to her, that policy was operative and was the reason for her being denied the position.

I also find as I said that the position was offered to a qualified woman, and that the offer contrary to your assertion, was in good faith and they could not offer her tenure for a good faith reason until she turned it down. The job was then offered to a black male who was qualified as your client, who was then hired for the reasons stated by Dean Pollack that they were very anxious to get people in there whom they felt could work with urban blacks. And this man Kaiser had had that kind of experience for two years in the District of Columbia College.

So the motion to dismiss your case at the end of the whole case is granted. Now, if you are going to take an appeal, of course, I would have to write out the findings of fact in greater detail, and you can submit proposed findings at that time if you want. But that motion is now granted. Thank you.

MR. SCHMIDT: Plaintiff does intend to appeal, your Honor.

THE COURT: And if the other side wants to submit proposed findings also, you can do so.

I said I would have to write out the findings in greater detail if he intends to appeal. You can submit proposed findings and in 30 days. I will give you 30 days to get those in. Today is the 18th, they are due June 19th.

Please don't ask for an extension of time as I know the transcript has been prepared.

(Discussion off the record)

Hand up the exhibits please when you hand in your proposed findings of fact.

Please remember to key your findings to the record. The same is true for the Plaintiff.

MS. BRADLEY: Both due at the same time?

THE COURT: Yes, key it to the record as I said.

THE COURT: The only issue is whether the plaintiff has made out a prima facie case here and I think we have gone through the elements; and with respect to qualifications for the job, she has not put all of those in. There are some in Joint Exhibit 7. In addition she claims that I should look at the job description and her qualifications and decide whether she was qualified for the position in determining what the qualifications were.

If I do that and look at Dr. Pollack's letter, that seems to me she has shown prima facie that she was qualified for the position. So that with respect to these four elements: That she was a member of a protected group; and that she applied and was qualified for a job; that despite her qualifications she was rejected; and 4 that after her rejection, the position remained open and the employer continued to seek

applicants. I think she has shown that. That is from the McDonald Douglas Corporation case at 411 U.S. 802.

As I said with respect to 4, I think another formulation of that might be that the position remained open and the employer hired someone in circumstances which gave rise to an inference of discrimination. Because I think that is what she has shown here, that someone else was hired; and as to the first person, it was a white woman. But the evidence shows prima facie based on Dr. James' testimony that was not a good faith offer as plaintiff claims. And as to the second applicant, I am not sure what the claim is, claim being that he was not qualified in the sense that he had not had prior experience at a college, and she would have been better qualified in that respect.

Now, I thought the claim was that there was a preference for blacks in hiring, black males or something to that effect. You have abandoned that, is that it?

MR. SCHMIDT: Judge, there was no testimony that I know about the implementation of an affirmative action policy for blacks who were in a less qualified position for a particular post. I don't know of any such policy. I think there was supposed to have been a policy instituted for women and for minorities.

THE COURT: I am asking you what your claim is.

MR. SCHMIDT: No, our claim is that--

THE COURT: Keizer got this job because he was black?

MR. SCHMIDT: No, our claim is that Dr. Keizer got the job because he was a male.

THE COURT: All right. Well, I will rule on the motion. The motion is denied for the reasons I have just indicated that the plaintiff has made out a prima facie case.

Now, under this decision as you know, the burden no shifts to the defendant to articulate some nondiscriminatory reason for not hiring the plaintiff, and of course, if they do that, then the burden shifts back to the plaintiff to show that the real reason was because she was a woman. Now, I think we have agreed to adjourn until Tuesday, May 12th, and that will be at 10 o'clock.

MS. BRADLEY: We intend to call Myron Pollack and Berryl Hunt; then on the 18th we have Dr. Minor.

(Trial adjourned until May 12, 1987, at 10:00 a.m.)